U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 14 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Mari Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as a lead senior researcher. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a statement and additional evidence. For the reasons discussed below, we withdraw the director's unsupported conclusions that the beneficiary does not work in an area of substantial intrinsic merit and that the proposed benefits of his work would not be national in scope. Nevertheless, we concur with the director that the request for a waiver of the alien employment certification process, based primarily on the claim that there is a shortage of available U.S. workers with the beneficiary's training and skills, is not warranted in the national interest. As will be explained below, a shortage of workers with the alien's training and skills is exactly the situation the alien employment certification process was designed to address.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds two Master's degrees, one in Environmental Biotechnology from [redacted] in India in 1999 and the other in Biology from [redacted] in Pennsylvania in 2002. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The director concluded, without any explanation, that the petitioner work does not work in an area of intrinsic merit. The beneficiary works as a "lead senior researcher." [redacted] an assistant professor at the petitioning institution, explains that in this position, the beneficiary oversees

"other technicians," revealing that the beneficiary is essentially a laboratory technician. This conclusion is consistent with [redacted]'s description of the beneficiary's duties, which include developing assays, transplanting bone marrow in laboratory animals and caring for the animals. The laboratory in which the beneficiary works is dedicated to developing gene therapy for hemophilia A. We are persuaded that this work has substantial intrinsic merit. We concur with the director's next statement, however, which states that the petitioner cannot establish the beneficiary's eligibility for a waiver of the alien employment certification process based on the importance of the area of employment alone.

Without explanation, the director next concludes that the proposed benefits of the beneficiary's work, gene therapy for hemophilia A, would not be national in scope. We withdraw this conclusion. It is readily apparent that gene therapy for hemophilia A, a disease that affects one in 5,000 males worldwide, would be national in scope.[1] It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. It is important to stress here that the modifier "minimum" does not nullify the word "qualifications" or suggest an unskilled worker. In other words, an available U.S. worker with the requisite "minimum qualifications" for the job is one who, by definition, is qualified for the job. The "minimum qualifications" for a given job may, in fact, be quite stringent.

Ultimately, eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

In response to the director's request for additional evidence, the petitioner submitted an article in the [redacted] stating that the beneficiary's research team won a Health-Care Heroes Health-Care Innovations award. The article, appearing in a local newspaper, does not indicate what

[1] [redacted], President and Chief Science Officer of Lentigen Corporation Headquarters, provides these statistics in his letter in support of the petition.

entity issued this award or anything else about the award. Moreover, the article names several of the team's researchers but does not name the beneficiary. Regardless, the article postdates the filing of the petition and, thus, cannot establish the beneficiary's eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

The petitioner submitted evidence that the beneficiary is a member of the [redacted] and the [redacted] Counsel also referenced the [redacted] The petitioner, however, did not document the beneficiary's membership in that society. Initially, the petitioner asserted that the beneficiary has more than 10 years of experience as a researcher. Professional memberships and 10 years of experience are two evidentiary requirements for aliens of exceptional ability, a classification that normally requires an alien employment certification. We cannot conclude that meeting two, or even the requisite three evidentiary requirements for that classification warrants a waiver of the alien employment certification in the national interest. By statute, "exceptional ability" is not, by itself, sufficient cause for a national interest waiver. *NYSDOT,* 22 I&N Dec. at 218.

The petitioner has submitted evidence that, as of the date of filing, the beneficiary had coauthored six articles. While the publication of articles may demonstrate national exposure, it cannot, by itself, demonstrate the beneficiary's impact on the field as a whole. As of the date of filing, two of the beneficiary's articles had been cited eight times and one article had been cited five times.

The record does contain evidence of the beneficiary's articles published after the date of filing and several citations that appeared after the date of filing. Such evidence, however, cannot establish the beneficiary's eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak,* 14 I&N Dec. at 49; *see also Matter of Izummi,* 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that his recently published research will subsequently prove influential. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d 257, 261 (4th Cir. 2008).

We acknowledge the two commentaries that discuss the beneficiary's work. The first commentary appears in the same issue of [redacted] that carried the beneficiary's article and is a synopsis of that work. While the commentary confirms the promising nature of that work, as it was issued contemporaneously with the article itself, it cannot establish that the work ultimately had a degree of influence in the field as a whole. In fact, the commentary notes the risks involved in the solutions proposed in the beneficiary's article that would need to be addressed. The second commentary is

merely a review of recent developments and cannot establish that the work ultimately influenced the field.

Of the remaining citations, one by [redacted] et. al. is extremely favorable, concluding that it is "exciting" that the beneficiary's findings on reducing large solid tumors, in addition to two other studies, provide "the basis for promising clinical trials." The remaining citations do not single out the beneficiary's work from the 100 or more other articles cited. In fact, two of the citations raise concerns about his work on programmed drug resistance. Specifically, [redacted] et. al. discusses several different strategies to programmed drug resistance, one of which is the beneficiary's work. The article then notes that concerns with these strategies include a "lack of effectiveness in selecting hematopoietic stem cells (HSCs) in vivo," "potential development of multiple-drug resistant leukemia," and "the use of highly genotoxic, carcinogenic drugs for selection." Finally, [redacted] et. al. notes the beneficiary's study on the hemoprotective approach using induced resistance to cladribine and 5-FU but points out that the doses needed for the selection induce severe myelosupression and "therefore it seems that this system is not suitable for in vivo selection of hematopoietic stem cells." For the reasons discussed above, the beneficiary's citation history is not, by itself, indicative of a degree of influence on the field as a whole.

The beneficiary has also coauthored work presented at conferences, although the record does not establish that he personally presented the work. The record, however, lacks evidence of the influence of these presentations.

As noted by counsel and the petitioner, the beneficiary's work is funded. All research, however, must receive funding from somewhere. It does not follow that every researcher who is working with a government grant inherently serves the national interest to an extent that justifies a waiver of the alien employment certification requirement.

The record also includes an email from [redacted] at an independent laboratory addressed to [redacted] an assistant professor at the petitioning institution and the beneficiary's coauthor. The email requests the use of [redacted]'s hemophilia treated mice. While this request demonstrates one laboratory's interest in these mice, the petitioner did not submit a letter from anyone at this laboratory explaining whether the mice were used successfully. None of the citations provided are articles by [redacted] raising the concern that [redacted]'s results with [redacted]'s mice have yet to warrant publication.

We now turn to the reference letters submitted. [redacted] describes the beneficiary's experience with the petitioner as follows:

> [The beneficiary] initiates experiments with limited or no supervision, he oversees the work of other technicians within the group, and he directly interacts with graduate and undergraduate studies who are working on their Bachelor's and Doctoral degrees. He is, without question, a vital part of our research group. His essential importance is

> evidenced by the laboratory skills that he possesses, which includes i) the development of immunological assays directed at measuring the concentrations of specific retrovirally expressed proteins, ii) the development of functional assays directed at measuring the activity of specific blood clotting proteins, iii) the ability to transplant bone marrow cells in small animals that have been preconditioned with a variety of chemotherapy and radiation treatments, iv) the ability to care for animals after receiving bone marrow transplants and v) his molecular biology knowledge that enables our laboratory to quickly clone cDNA sequences encoding genetically-engineered proteins involved in blood coagulation. These skills, and others that were not mentioned, make him a vital part of our group and necessitates the approval off this petition. [The beneficiary's] skill set has taken him years to master. Because he is unique in his ability to understand and implant assay development, it will be impossible to replace his role within our program.

As stated in *NYSDOT,* 22 I&N Dec. at 221, it cannot suffice to state that the alien possesses useful skills, or a "unique background." When discussing claims that the beneficiary in that case possessed specialized design techniques, the AAO asserted:

> [Such experience] would appear to be a valid requirement for the petitioner to set forth on an application for a labor certification. [The] assertion of a labor shortage, therefore, should be tested through the labor certification process. . . . The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor.

Id. at 220-221. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.* at 221. [redacted] does not explain why the beneficiary's experience and skills are not amenable to enumeration on an application for alien employment certification.

[redacted], another professor at the petitioning institution, notes that the beneficiary is listed as the first author of a 2006 article in [redacted] which led to two additional articles listing the beneficiary as a coauthor. In describing the beneficiary's specific contributions to his laboratory, however, [redacted] simply lists several techniques that the beneficiary has mastered, all of which are presumably amenable to enumeration on an application for alien employment certification.

[redacted] Director of Gene Therapy at the Aflac Cancer Center and Blood Disorders Service and an assistant professor at the petitioning institution, asserts that the beneficiary "helped develop and characterize a chimeric human/porcine high expression F8 cDNA sequence that expresses up to 100-fold higher levels of the protein product compared to other F8 sequences that are currently in use." [redacted] asserts that his laboratory has used this novel cDNA to cure transgenic mice with hemophilia A by transplanting gene-modified hematopoietic stem cells. [redacted] does not specify exactly how the beneficiary "helped" in the development of a novel cDNA. Rather, [redacted]

concludes that the beneficiary is "one of only a few individuals that fully comprehend the use of recombinant retroviruses used in the transfer of recombinant DNA sequences that generate a recombinant protein that can function to replace the deficient protein in hemophilia A patients." We reiterate that the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

[redacted] an associate professor at the Georgia Institute of Technology, indicates that he has collaborated with the beneficiary's research team. [redacted] also confirms that the beneficiary "has an outstanding understanding of gene transfer methodologies, and his expertise in manipulating cells for the delivery of therapeutic genes is, without question, extremely advanced. Furthermore, his ability to develop assays and methods for detecting gene sequences after delivery and protein expression from genetically engineered cells is extremely sophisticated." Nothing in [redacted]'s letter explains why the beneficiary's skills and experience are not amenable to enumeration on an application for alien employment certification.

The petitioner also provided a joint letter from [redacted] and [redacted] of Expression Therapeutics, which has collaborated with the beneficiary's research team. The joint letter confirms that the beneficiary "uses his expertise in protein expression and purification to successfully produce, purify and characterize large preparations of this hemophilia A product." While the letter affirms that the product is "novel" the innovative nature of the beneficiary's contribution to the product is not readily apparent. Regardless, original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The remaining letters, including those submitted in response to the director's request for additional evidence and on appeal provide similar information to that discussed above. For example, [redacted] a professor of Microbiology and Immunology at the University of Maryland School of Medicine, asserts generally that the beneficiary has made outstanding original contributions but as examples merely references the beneficiary's coauthored scholarly articles and the beneficiary's "elaborate perspective of the technology developed both at [the petitioning institution] and Lentigen."

The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought.

Id. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters considered above primarily contain bare assertions of recognition and vague claims of contributions without specifically providing specific examples of how those contributions have influenced the field. Merely repeating the language of the legal requirements does not satisfy the petitioner's burden of proof.[2] The petitioner also failed to submit corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

Ultimately, as in *NYSDOT,* 22 I&N Dec. at 215, the basis for requesting a waiver of the alien employment certification is the claimed shortage of available U.S. workers with the beneficiary's laboratory skills and experience. The AAO unequivocally rejected claims of unique skills as a basis for a waiver of the alien employment certification process in the national interest. *NYSDOT,* 22 I&N Dec. at 221. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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[2] *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. 9, 15 (D.C. Dist. 1990).

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.